HORIZON HILLS RESORT BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[APPEAL NO: WA-14-51-10-2020]
19 DECEMBER 2023

Abstract – *Each taxation case must be resolved by applicable principles and by considering the nature of the particular trade being carried on and the relation of the expenditure to the promotion of the trade; there is no universal test.*

REVENUE LAW: *Income tax – Assessment – 'Deemed' assessment – Appeal against deciding order – Company in business of operating golf and recreational club – Capital expenditure incurred on disputed items – Capital allowance – Deduction in computing chargeable income – Qualifying plant expenditure – 'Apparatus' test – Tax liability – Income Tax 1967, sch. 3*

The present appeal stemmed from the deciding order by the Special Commissioners of Income Tax ('SCIT'), in favour of the Director General of Inland Revenue ('respondent'), dismissing an appeal by the appellant and upholding the 'deemed' assessment by the respondent for the year of assessment 2010 under the Income Tax 1967 ('ITA'). The appellant was in the business of operating a golf and recreational club. The disputed items which formed the subject matter of the appeal were: (i) a golf course, which included the drainage system, grass and turfing, land cost, maintenance workshop, buggy charging station, golf bag station, caddies station and other incidental costs; (ii) swimming pool and kids' fun pool; (iii) gymnasium; (iv) two tennis courts; (v) a table tennis room; (vi) children playing area; (vii) changing rooms; (viii) towel stations and toilets; (x) multipurpose room, which included a multipurpose hall and ballroom; (xi) food and beverage outlets, which included the golfer's terrace, the poolside cafe, the Chinese restaurant and the golfer's halfway hut cafe; (xii) a reading room; (xiii) a health centre; and (xiv) a pro shop and a sports shop. The SCIT found that: (i) the income of the appellant was derived from membership and subscription fees from its members and the income from other operations at the club; (ii) the disputed items, apart from the golf course, were housed in the club's premises while the golf course was beside the golf club's premises; (iii) on the application of the 'apparatus' test, the disputed items, apart from the golf course, were not 'plants' as they were necessary facilities that made up a recreational club. The disputed items were premises, whether taking the form of a building space or land or pool, in which the business of a recreational club was carried on and not something with which the business

was carried on; (iv) a golf course was the sum total of all its parts and components. This would include the drainage system, grass and turfing, land costs, maintenance workshop, buggy charging station, golf bag and caddies station. All these were what made the premises a course for golf to be played on and, therefore, was a golf course; and (v) taking into account the manner in which income was generated, the golf course was a facility upon which players could play golf and it would do violence to the language to say the golf course was a facility with which golf was played. The primary issue that arose for adjudication was whether the SCIT erred in disallowing the capital expenditure incurred on the disputed items by the appellant, pursuant to Schedule 3 of the ITA.

Held (dismissing appeal):

(1) Section 42 of the ITA provides that capital allowances are allowed as a deduction in computing chargeable income and thus, the tax liability of a company. Such capital allowance is permitted if it falls within the scope of qualification expenditure under para. 1 of Schedule 3 of the ITA, which is either 'qualifying plant expenditure' or 'qualifying building expenditure'. Both these expenditures are subject to the other provisions of the said Schedule. The instant case concerned only 'qualifying plant expenditure' which was governed by para. 2(1). Thus, the burden on the taxpayer claiming such allowance was to show that the expenditure was capital expenditure incurred on procurement of 'machinery or plant' used for the purposes of business. (paras 8-10)

(2) The SCIT applied the correct law and did not misapply the apparatus of which the premises test was a part of. It was a decision which the SCIT was entitled to make on the primary facts and application of the law. There was no error of law warranting appellate interference. It was only in rare cases that a building or structure is 'premises' as well as 'plant'. (paras 30 & 31)

Case(s) referred to:

Chua Lip Kong v Director-General of Inland Revenue [1981] CLJU 157; [1981] 1 LNS 157 PC ***(refd)***

Commissioners of Inland Revenue v. Waitaki International Ltd [1990] 3 NZLR 27 ***(refd)***

Cooke (Inspector of Taxes) v. Beach Station Caravans Ltd [1974] 3 All ER 159 ***(refd)***

Hinton v. Maden & Ireland [1959] 3 All ER 356 ***(refd)***

Inland Revenue Commissioners v. Barclay Curie & Co Ltd [1969] 1 All ER 732 ***(refd)***

Inland Revenue Commissioners v. Scottish And Newcastle Breweries Ltd [1982] STC 296 ***(refd)***

J Lyons & Company Limited v. Attorney-General [1944] Ch 281 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Resort Poresia Berhad [2015] MSTC 30-090 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Tropiland Sdn Bhd [2013] MTSC 30-054 ***(refd)***

Mamor Sdn Bhd v. Director-General of Inland Revenue [1979] CLJU 145; [1979] 1 LNS 145 ***(refd)***

Resort Poresia Berhad [2015] MSTC 30-090 ***(refd)***
Schofield (HM Inspector of taxes) v. R & H Hall Ltd [1975] STC 353 ***(refd)***
Shove (Inspector of Taxes) v. Lingfield Park 1991 Ltd [2004] STC 805 ***(refd)***
Tropiland Sdn Bhd [2013] MTSC 30-054 ***(refd)***
UHG v. Director-General of Inland Revenue [1974] CLJU 181; [1974] 1 LNS 181 FC ***(refd)***
Wimpy International Ltd v. Warland (Inspector of Taxes) [1989] BTC 58 ***(refd)***
Yarmouth v. France [1887] QBD 647 ***(refd)***

Legislation referred to:
Income Tax Act 1967, s. 42, Schedule 3 para 1

For the appellant - S Saravana Kumar, Yap Wen Hui & Nur Hanina Mohd Azham; M/s Rosli Dahlan Saravana Partnership
For the respondent - Ridzuan Othman; SRC & Amir Syafiq Abdul Karim; RC

Reported by Najib Tamby

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] This is an appeal by Horizon Hills Resort Berhad, the appellant, against the deciding order made by the Special Commissioners of Income Tax ("SCIT"), in favour of the Director General of Inland Revenue ("DGIR"). The SCIT had dismissed an appeal by the appellant and upheld the "deemed" assessment by the DGIR for the Year of Assessment 2010 under the Income Tax Act 1967 ("ITA"). It was the appellant's case that it was qualified for capital allowance on the expenditure incurred on certain items that are plant expenditure set out below under Schedule 3 of the ITA ("the disputed items"). The SCIT disagreed and hence, this appeal.

[2] The disputed items which is the subject matter of this appeal are:

(i) golf course (which includes the drainage system, grass and turfing, land cost, maintenance workshop, buggy charging station, golf bag station, caddies station and other incidental costs);

(ii) swimming pool and kid's fun pool;

(iii) gymnasium;

(iv) two tennis courts;

(v) a table tennis room;

(vi) children playing area;

(vii) changing rooms;

(viii) towel stations and toilets;

(ix) multipurpose room which includes a multipurpose hall and ballroom;

(x) food and beverage outlets (the golfer's terrace, the poolside cafe, the Chinese restaurant and the golfer's halfway hut cafe);

(xi) a reading room;

(xii) a health centre; and

(xiii) a pro shop and a sports shop.

[3] The central issue in this appeal is whether the SCIT erred in disallowing the capital expenditure incurred on the disputed items by the appellant under Schedule 3 of the ITA. On 23 June 2023, I dismissed the appeal and affirmed the decision of the SCIT. My reasons are as follows.

Analysis And Decision

[4] The appellant is in the business of operating a golf and recreational club. The issue before the SCIT was whether the disputed items qualify for plant expenditure under Schedule 3 of the ITA. The appellant contended that appellate interference was warranted as the SCIT had misapplied the test stated in *Ketua Pengarah Hasil Dalam Negeri v. Tropiland Sdn Bhd* [2013] MTSC 30-054 (para. 13 of the appellant's written submission in reply). It was argued that the "functional test" adopted in *Tropiland Sdn Bhd* is the present law and binding on the SCIT as well as this court sitting on appeal. It was further argued that if the test was applied the decision of the SCIT would be different and the disputed items held to be "plants". The cases of *Inland Revenue Commissioners v. Barclay Curie & Co Ltd* [1969] 1 All ER 732 and *Cooke (Inspector of Taxes) v. Beach Station Caravans Ltd* [1974] 3 All ER 159 were cited in support.

[5] The DGIR contended that the SCIT's decision was correct, in that, the disputed items do not qualify for capital allowances. DGIR in the main relied on the test and decisions in *Ketua Pengarah Hasil Dalam Negeri v. Resort Poresia Berhad* [2015] MSTC 30-090 and *Wimpy International Ltd v. Warland (inspector of Taxes)* [1989] BTC 58 although providing a summary of other tests used in cases such as: (i) the "setting test" (*J Lyons & Company Limited v. Attorney-General* [1944] Ch 281); (ii) the "functionality test" (*Hinton v. Maden & Ireland* [1959] 3 All ER 356); and (iii) the "business use" and "premises test" (*Shove (Inspector of Taxes) v. Lingfield Park 1991 Ltd* [2004] STC 805.

[6] I am of the view that it would not help in going through an analysis of all these cases for it is clear from the cases both from the United Kingdom and Malaysia there is no universal test and each case is dependent on its own peculiar trade and the nature of the expenditure to the promotion of the taxpayer's business. This was pointed out by the Court of Appeal in *Resort*

Poresia Berhad by referring to the following observation of Lord Wilberforce in *Inland Revenue Commissioners v. Scottish and Newcastle Breweries Ltd* [1982] STC 296:

> There is no universal formula which can solve these puzzles. In the end each case must be resolved, in my opinion, by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade.

[7] In dealing with this appeal, I reminded myself of the function of this court sitting on appeal on a case stated by the SCIT. It is clear that the determination of the issue of whether the disputed items are "plants" matter is committed by the ITA to the SCIT. The proceeding before this court is also not a rehearing and, in the circumstances, it is my function to see how the SCIT proceeded with the issue, directed themselves on the law and arrived at their decision. All this would be found in the case stated.

The Law On Capital Allowance And General Principles

[8] Before, I proceed to the case stated, it is pertinent to look at the law that gave rise to the dispute which the SCIT had to resolve. Section 42 of the ITA provides that capital allowances are allowed as a deduction in computing chargeable income and thus the tax liability of a company. Such capital allowance is permitted if it falls within the scope of qualification expenditure under para. 1 of Schedule 3 of the ITA which is either "qualifying plant expenditure" or "qualifying building expenditure". Both these expenditures are subject to the other provisions of the said Schedule.

[9] The instant case concerns only "qualifying plant expenditure" which is governed by para. 2(1) which read:

> Subject to sub-paragraph (2) and paragraph 67, qualifying plant expenditure is capital expenditure incurred on the provision of machinery or plant used for the purposes of business, including ...

[10] Thus, the burden on the taxpayer claiming such allowance is to show that the expenditure is capital expenditure incurred on procurement of "machinery or plant" used for the purposes of business. The issue in the instant case is whether the disputed items are "plant" within the meaning of Schedule 3.

[11] The reason why there is no universal test is due to the fact that the word "plant" is incapable of definition for the purposes of the Schedule 3 (see the observation by Lord Wilberforce (para. [6] above)). In this regard, the decisions of the Court of Appeal in *Tropiland Sdn Bhd* [2013] MTSC 30-054 and *Resort Poresia Berhad* [2015] MSTC 30-090 (which was decided nine months later) are instructive. The test propounded by Lindley J in *Yarmouth v. France* [1887] QBD 647 was adopted and applied in both the cases. The test which is known as the 'apparatus test' was described in the following words:

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> There is no definition of plant in the Act; but, in its ordinary sense, it includes whatever apparatus is used by a businessman for carrying on his business, – not his stock in trade, but all goods and chattels, fixed or moveable, which he keeps for permanent employment in his business.

[12] In *Tropiland Sdn Bhd* the Court of Appeal observed that what passes B as a "plant" in *Yarmouth* was coined in the widest possible sense and that a host of considerations must be taken into consideration in making such determination and adopted the statement by Lord Lowry in *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd*:

> The problem which the commissioners were called upon to solve was one C concerned with a "service industry": I think this factor is important, because the question of what is properly to be regarded as "plant" can only be answered in the context of the particular industry concerned and possibly, in light also of the particular circumstances of the individual taxpayers' own trade. ... I think that much difficulty is caused by seeking to place limitative interpretations on the simple word "plant". I do not D think that the classic definition propounded in *Yarmouth v. France* suggests that it is a word which is other than of comprehensive meaning – "whatever apparatus is used by a business man for carrying on his business" – whatever the business may be.

[13] Thus, a holistic approach is needed in every case by looking at the E taxpayer's business as a whole set of operations directed towards producing income. It was by this approach that that large and permanent structures were held to be "plant" rather than "a setting" or "a place of business" as held in *Inland Revenue Commissioners v. Barclay Curie & Co Ltd* [1969] 1 All ER 732; *Schofield (HM Inspector of taxes) v. R & H Hall Ltd* [1975] STC 353 and F *Commissioners of Inland Revenue v. Waitaki International Ltd* [1990] 3 NZLR 27.

[14] The approach was applied in *Tropiland Sdn Bhd* where the disputed "plant" was a multi-storey car park. There the primary fact was that the respondent was a car park operator and that its car park business was in line G with the terms of a lease agreement with the Penang Development Corporation. The car park was for the users and occupiers of a building complex based on the said lease agreement. In order to carry on this business, the respondent was required by the lease agreement to construct the multi-storey car park. Once constructed, the multi-storey car park was to be H used to service the users and occupiers of a building. The multi-storey car park, *albeit*, a building is an essential component of the respondent's business without which the respondent could not have generated its revenue. The respondent's income was generated by providing bays for the users and occupiers to park their vehicles. It was held that, without the multi-storey car park, the respondent could not have generated any income since the lease I agreement restricts the use to which the respondent may put the land. The

multi-storey car park on the primary facts and being a service industry satisfied the "apparatus test" as the structure was to generate income rather than being premises.

[15] The issue in *Resort Poresia Berhad* was whether the expenditure on turfing and grass on the golf course was "plant". There the primary fact was that income of the company came from licence fees, subscription fees, and other club operations from persons who come to enjoy the facilities the company provided. The Court of Appeal held applying the "apparatus test" that:

> [17] Accepting the evidence of Resort Poresia Bhd on selection of turf and grasses and their functionality does not alter the fact that the functionality afforded by the different grasses are part and parcel of the quality of the golf course itself. A golf course is the sum total of all its parts and components. To put it another way, the course and its layout, with the turf and the grasses planted thereon are what makes the course a course for golf to be played thereon, therefore a golf course. The argument that turf grasses is distinct from the golf course, overlooks the facts a course is a golf course only when the grasses planted thereon allows golf to be played on it. The grasses chosen are therefore an inseparable part and parcel of the golf course, and therefore if the golf course is premises the business of Resort Poresia Bhd is carried on from, the turf and grasses are part and parcel of such premises. ...
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> [18] The question then remains whether a golf course falls within the meaning of "plant" and qualifies as qualifying expenditure. ...
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> [20] The germane question is whether the Special Commissioners in making their finding whether expenditure on turfing and grass on a golf course is qualifying expenditure had erred in their application of the principles set out in relevant case-law.
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> ...
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> [22] Bearing in mind (a) the above, (b) the fact the golf course was such a facility upon which players could play golf and (c) that it would do violence to the language to say the golf course was a facility with which golf is played, or in other words it is not a plant used in carrying out the business of Resort Poresia Bhd, but premises from which the business is carried on, it cannot be said that the Special Commissioners, on the basis of case law had erred in making its finding. It was a finding the Special Commissioners were well entitled to make. ...

[16] Thus, ultimately, each case must be resolved by application of the principles stated above and by considering carefully the nature of the particular trade being carried on and the relation of the expenditure to the promotion of the trade.

A **The Findings And Decision Of The SCIT**

[17] I now return to the case stated. The primary finding of fact made by the SCIT was that the appellant was carrying on the business of a recreational club and golf course. The income of the appellant was derived from membership fees and subscription fees from its members and income from
B other operations at the club. It was the finding of the SCIT that the disputed items apart from the golf course were housed in the club premises while the golf course was beside the golf club premises.

[18] This means that the swimming pools, gymnasium, tennis courts, table
C tennis room, children playing area, changing rooms, towel stations, toilets, multipurpose rooms including ballroom and reading room, food and beverage outlets, health centre and shops are all housed in the club premises. While the golf course which includes drainage system, grass and turfing, land cost, maintenance workshop, buggy charging station, golf bag and caddies station are on the golf course.
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[19] The SCIT had referred to and applied the "apparatus test" propounded by Lindley J in the *Yarmouth* case which test was refined by Lord Lowry in *Commissioners of Inland Revenue v. Scottish & Newcastle Breweries Ltd*. The present state of the law, after referring to case law, in particular, Lord
E Lowry's exposition of the law on the subject was stated by Fox LJ in *Wimpy International Ltd v. Warland (Inspector of Taxes)* [1989] BTC 58 as follows:

> In the light of the authorities, the position appears to me to be this. There is a well established distinction, in general terms, between the premises in which the business is carried on and the plant with which the business
F is carried on. The premises are not plant. In its simplest form that is illustrated by Lord Lowry's example of the creation of atmosphere in a hotel by beautiful buildings and gardens on the one hand and fine china, glass and other tableware on the other. The latter is plant; the former are not.

[20] The above distinction was qualified by Lord Lowry in the following
G words:

> "Something which becomes part of the premises instead of merely embellishing them is not plant except in the rare case where the premises are themselves plant". The latter part of those observations is a reminder that it is not sufficient to say that something is part of real property. It
H can still be as the *Barclay Curie* and *Beach Station Caravans* cases show.

[21] The SCIT, on the application of the "apparatus" test concluded that the disputed items, apart from the golf course, are not being "plants" as they are necessary facilities that make up a recreational club. These disputed items are premises, whether taking the form of a building space or land or pool,
I in which the business of recreational club is carried on and not something with which the business is carried on.

[22] The SCIT relying on *Resort Poresia Berhad*, reasoned that a golf course is the sum total of all its parts and components. This would include the drainage system, grass and turfing, land cost, maintenance workshop, buggy charging station, golf bag and caddies station. All this is what makes the premises a course for golf to be played thereon and therefore a golf course. Thus, taking into account the manner in which income is generated, that the golf course is a facility upon which players could play golf and that it would do violence to the language to say the golf course was a facility with which golf is played – the reasons that made the golf course in *Resort Poresia Berhad* premises and not "plant" with which the business is carried on.

[23] The SCIT also found support for the conclusion reached based on the decision on *Shove (Inspector of Taxes) v. Lingfield Park* (1991) Ltd [2004] STC 805. In *Lingfield Park* (1991) Ltd the issue was whether an All Weather Track ("AWT") installed at a race course was "plant". The Court of Appeal said that it was necessary to identify the item in question, consider its use in the business and then to ask whether it functioned as plant or premises (*Wimpy International Ltd v. Warland* [1989] BTC 58 applied). It was held that on the application of the premises test was that the AWT functioned as premises on or in which the trade was carried on. The purpose, use, construction and nature of the AWT were such that the AWT functioned as premises for horse racing, as did the grass race course running parallel with it. It would be inaccurate to describe any of them as the apparatus with which the trade of organising and promoting horse racing was carried on. Thus, the SCIT reached the conclusion that the golf course is not an apparatus *ie*, "plant" with which the business is carried on.

Principles Governing Appellate Intervention

[24] In considering this appeal, I kept in mind the established principles propounded in *Chua Lip Kong v. Director-General of Inland Revenue* [1981] CLJU 157; [1981] 1 LNS 157; [1982] 1 MLJ 235; *UHG v. Director-General of Inland Revenue* [1974] CLJU 181; [1974] 1 LNS 181; [1974] 2 MLJ 33 and *Mamor Sdn Bhd v. Director-General of Inland Revenue* [1979] CLJU 145; [1979] 1 LNS 145; [1981] 1 MLJ 117 that governs the function of the High Court when determining an appeal from the SCIT. The principles are as follows.

[25] The High Court is concerned with the facts stated in the case stated as it is the points of law upon those facts that the High Court is asked to decide. The findings of primary facts by the SCIT are unassailable. So too are inferences of pure fact if drawn from primary facts admitted or proved. The High Court is however permitted to correct any assumption made as to the legal effect or consequences of primary facts if it can be shown that the SCIT proceeded upon some erroneous assumption as to the relevant law. Interference is also permitted if there is no evidence to justify the finding

made or where the SCIT have applied erroneous tests in arriving at their conclusions or have drawn a wrong inference on the facts or have misdirected themselves in law.

[26] The question for the High Court is whether, given the facts as stated, the SCIT were justified in law in reaching the conclusions they did reach. But the High Court is not entitled to interfere with the decision of the SCIT even if the High Court would not have come to the same conclusion, on the same material. Neither would the High Court substitute its own preferred inference if the primary facts found by the SCIT are capable of two alternative inferences.

[27] The last stage is to consider the grounds of appeal.

The Appellant's Contentions

[28] In the appellant's written submissions, it was contended that the SCIT misapplied the prescribed test to disallow the capital expenditure on the disputed items. It was argued that the SCIT misapplied the test formulated in *Yarmouth* and did not give due consideration to the particular industry concerned as well as the specific circumstances of the individual taxpayer's business. The following passage in the case stated was reproduced with regard to the misapplication of the test:

> Perayu menghujahkan dengan menggunakan "Functionality test", "Disputed plants" adalah loji dan Perayu dalam penghujahan mereka telah merujuk kepada keputusan dalam kes *Tropiland* dan *Infra-Quest*. Kami berpandangan terdapat perbezaan fakta yang ketara antara dua kes tersebut dengan kes Perayu sekarang ini. Kedua-dua kes tersebut tidak melibatkan perniagaan yang sama dalam Rayuan sekarang ini. Dalam kedua-dua kes tersebut tempat meletak kereta dan Menara yang dibina bukanlah satu kemudahan yang perlu disediakan oleh Pembayar Cukai tetapi merupakan apparatus dan berfungsi sebagai alat untuk menjana pendapatan Perayu (Paragraph XV at page 113 Case Stated).

[29] The appellant further argued that the disputed items are "plant' based on the decisions of *Tropiland Sdn Bhd*, *Barclay Curie & Co Ltd* and *Beach Station Caravans*.

Whether Appellate Interference Warranted?

[30] It is my finding that the SCIT applied the correct law and did not misapply the "apparatus" of which the "premises" test is a part of. It was a decision the SCIT was entitled to make on the primary facts and application of the law. I did not find any error of law that warranted appellate interference on the established principles stated above.

[31] Also as shown above, it is only in rare cases that a building or structure is "premises" as well as "plant". *Tropiland Sdn Bhd*, *Barclay Curie & Co Ltd* and *Beach Station Caravans Ltd* were such rare cases. Thus, the cases were unhelpful. The facts in *Tropiland Sdn Bhd* were such that the car park building itself was the "plant" with which the business was carried on. The application of the test resulted in that outcome. The car park was not a merely a building in which the business is carried on by its construction or suitability but something with which the business was carried on.

[32] Likewise, in *Barclay Curie & Co Ltd,* the dry dock structure fulfilled the function of plant in the trader's operation. Every part of the dry dock plays an essential part in getting large vessels into position where work on the outside of the hull can begin and that it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock was "plant" with which the business of the taxpayer was performed.

[33] Similarly, in *Beach Station Caravans Ltd* the taxpayer company operated a caravan site. As an added attraction a swimming pool and a paddling pool was constructed at the site. The embellishment was to attract customers to the caravan site. The pools were apparatus used by the taxpayer company and therefore "plant" for carrying on its business.

Conclusion

[34] Since there was no error committed by the SCIT that warrants appellate interference, the appeal is dismissed with costs.